

No.

8425

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of

JAMES MARTIN KIRKPATRICK,

Debtor.

E. H. HARDT,

Appellant,

vs.

JAMES MARTIN KIRKPATRICK,

Appellee.

Transcript of Record.

Upon Appeal from the District Court of the United States for the
Southern District of California, Central Division.

FILED

FEB - 3 1937

PAUL P. O'BRIEN,

CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italics; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors.

For Appellants:

SURR & HELLYER, Esqs.,
204 Citizens National Bank Bldg.,
San Bernardino, California.

For Appellee:

NELSON C. PETERS, Esq.,
Katz Building,
San Bernardino, California.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

In the Matter of) No. 8425
JAMES MARTIN KIRKPATRICK,)
Debtor.) CITATION

UNITED STATES OF AMERICA) ss.

THE PRESIDENT OF THE UNITED STATES
OF AMERICA,

To JAMES MARTIN KIRKPATRICK, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the Federal Building in the City and County of San Francisco, State of California, within 30 days from the date hereof, pursuant to a petition for appeal filed in the Clerk's office of the above entitled Court wherein E. H. Hardt is appellant and you are appellee, to show cause, if any there be, why the order mentioned in said petition for appeal should not be corrected and speedy justice done in that behalf.

Given under my hand at the City of San Francisco, in the Circuit aforesaid this 6th day of January, 1937, and of the independence of the United States the one hundred and *fiftieth* year.

Curtis D. Wilbur
Judge of the United States Circuit Court
of Appeals, Ninth Circuit.

Service of a copy of the above citation is hereby acknowledged this 14th day of January, 1937.

R. C. Peters
Attorney for debtor above named.

[Endorsed]: Filed R. S. Zimmerman, Clerk, at 37 min past 12 o'clock p. m. Jan. 16, 1937 By R. B. Clifton, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES, IN AND FOR THE SOUTHERN
DISTRICT OF CALIFORNIA,
CENTRAL DIVISION.

In the Matter of)	
	)	No. 26720-Y
JAMES MARTIN KIRK-	)	(C.C.A., 9th Cir.)
PATRICK,	)	( No. 8425)
)	
Debtor.)	
-----)	
E. H. HARDT,)	
)	
Appellant,)	
	)	AGREED
vs.	)	STATEMENT
	)	OF THE CASE
JAMES MARTIN KIRK-)	
PATRICK,)	
)	
Appellee.)	

On October 18, 1935, the above named debtor filed his petition in the above entitled matter, in the above entitled court, in the following form, to-wit:

“DEBTOR’S PETITION

Debtor’s Petition in the Proceedings Under
Section 75 of the Bankruptcy Act

To the Honorable Judge of
the District Court of the United States for the
SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

The Petition of JAMES MARTIN KIRKPATRICK
of Ontario, in the County of San Bernardino, and District
and State of California Respectfully Represents:

That he is personally bona fide engaged primarily in farming operations (or that the principal part of his income is derived from farming operations) as follows WALNUT GROVE that such farming operations occur in the county (or counties) of SAN BERNARDINO within said judicial district; that he is insolvent (or unable to meet his debts as they mature); and that he desires to effect a composition or extension of time to pay his debts under section 75 of the Bankruptcy Act.

That the schedule hereto annexed, marked "A", and verified by your petitioner's oath, contains a full and true statement of all his debts, and (so far as it is possible to ascertain) the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said act.

That the schedule hereto annexed marked 'B', and verified by your petitioner's oath, contains an accurate inventory of all his property, both real and personal, and such further statements concerning said property as are required by the provisions of said act.

WHEREFORE your petitioner prays that his petition may be approved by the court and proceedings had in accordance with the provisions of said section.

JAMES MARTIN KIRKPATRICK,
Petitioner

.....
Attorney for Petitioner

OATH TO PETITION

UNITED STATES OF AMERICA)
 SOUTHERN DISTRICT OF CALIFORNIA)
 CENTRAL DIVISION)
) SS.
 State of CALIFORNIA)
 County of SAN BERNARDINO.)

I, JAMES MARTIN KIRKPATRICK the petitioning
 debtor mentioned and described in the foregoing petition,
 do hereby make solemn oath that the statements con-
 tained therein are true according to the best of my knowl-
 edge, information, and belief.

JAMES MARTIN KIRKPATRICK
 Petitioner

Subscribed and sworn to before me this)
 14th day of OCTOBER, 1935)

Notary Public in and for the NOAH ADAIR
 County of SAN BERNARDINO NOTARY PUBLIC
 State of CALIFORNIA

(SEAL)

SUMMARY OF DEBTS AND ASSETS

(From the Statements of the Bankrupt in Schedules
A and B)

		Dollars	Cents
Schedule A . . 1	(1) Taxes and Debts due United States		
“ A . . 1	(2) Taxes due States, Counties, Districts and Municipalities,	859.01	
“ A . . 1	(3) Wages		
“ A . . 1	(4) Other Debts preferred by law		
“ A . . 2	Secured claims	12800.	
“ A . . 3	Unsecured claims	582.91	
“ A . . 4	Notes and bills which ought to be paid by other parties thereto		
“ A . . 5	Accommodation paper		
	Schedule A, total	14241.92	
Schedule B . . 1	Real Estate	19225.00	
“ B . . 2-a	Cash on hand		
“ B . . 2-b	Bills, promissory notes and securities		
“ B . . 2-c	Stock in trade		
“ B . . 2-d	Household goods, etc.	50.00	
“ B . . 2-e	Books, prints and pic- tures		

“	B. . 2-f	Horses, cows and other animals	
“	B. . 2-g	Carriages and other vehicles	10.00
“	B. . 2-h	Farming stock and implements	
“	B. . 2-i	Shipping and shares in vessels	
“	B. . 2-k	Machinery, tools, etc	
“	B. . 2-l	Patents, copyrights and trade marks	
“	B. . 2-m	Other personal property	
“	B. . 3-a	Debts due on open account	
“	B. . 3-b	Stocks, negotiable bonds, etc	
“	B. . 3-c	Policies of insurance	
“	B. . 3-d	Unliquidated claims	
“	B. . 3-e	Deposits of money in banks and elsewhere	
“	B. . 4	Property in reversion, remainder, trust, etc.	
“	B. . 5	Property claimed to be exempt (\$60.00)	
“	B. . 6	Books, deeds and papers	
		Schedule B, total,	19285.00

.....

JAMES MARTIN KIRKPATRICK Petitioner

SCHEDULE A (2)

CREDITORS HOLDING SECURITIES

(N.B.—Particulars of securities held, with dates of sale, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the acts of Congress relating to Bankruptcy; and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

Dollars Cents

Mr. E. H. Hardt, Ontario, California, dated 1928, Trust Deed, contracted in Uplands, California, for value and description see Item One, page 7. Principal \$4,000.00

Interest 500.00 Approx. 4,500.00

First Trust Joint Stock Land Bank of Chicago, Ill. mortgage, dated unknown, contracted in Pomona, California, for value and description see Item Two, page 7.

Principal \$8,000.00

Interest 300.00 8,300.00

Total 12,800.00

JAMES MARTIN KIRKPATRICK Petitioner

* * * * *

OATH TO SCHEDULE A

UNITED STATES OF AMERICA)
 SOUTHERN DISTRICT OF CALIFORNIA) ss.
 CENTRAL DIVISION)

On this 14th day of October, A. D. 1935, before me, personally came JAMES MARTIN KIRKPATRICK the person mentioned in and who subscribed to the foregoing schedule and who, being by me first duly sworn, did declare the said schedule to be a statement of all HIS debts, in accordance with the Acts of Congress relating to Bankruptcy.

JAMES MARTIN KIRKPATRICK

(SEAL)

NOAH ADAIR

Notary Public in and for the County of SAN
 BERNARDINO, State of CALIFORNIA

SCHEDULE B (1)

SCHEDULE B. STATEMENT OF ALL PROPERTY
 OF DEBTOR

REAL ESTATE

Dollars Cents

Location and description of all real estate owned by debtor, or held by him.—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.

ITEM ONE:

The South 314 feet of Lots 3 and 4 in Block 19, MONTE VISTA TRACT NO. 2 as per plat recorded in Book 16 of Maps, page 33,

records of said County, San Bernardino County, Calif.

Value - - - - - 5500.00

ITEM TWO:

Section Five and Section Eight, Evans Township, Marshall County, Illinois

Value - - - - - 13725.00

Total 19225.00

.....

JAMES MARTIN KIRKPATRICK Petitioner

OATH TO SCHEDULE B

UNITED STATES OF AMERICA)
SOUTHERN DISTRICT OF CALIFORNIA) SS.
CENTRAL DIVISION)

On this 14th day of October, A. D. 1935, before me, personally came JAMES MARTIN KIRKPATRICK the person mentioned in and who subscribed to the foregoing schedule and who, being by me first duly sworn, did declare the said schedule to be a statement of all HIS estate, both real and personal, in accordance with the Acts of Congress relating to bankruptcy.

JAMES MARTIN KIRKPATRICK

(SEAL)

NOAH ADAIR

Notary Public in and for the County of SAN BERNARDINO, State of CALIFORNIA

On October 18, 1935, said court made its order approving said petition as follows:

“(TITLE COURT AND CAUSE)

APPROVAL OF DEBTOR'S PETITION
and Order of Reference.

At Los Angeles, in said District, on Oct. 18, 1935, before the said Court the petition of JAMES MARTIN KIRKPATRICK that he desires to effect a composition or an extension of time to pay his debts, and such other relief as may be allowed under the Act of March 3, 1933, and within the true intent and meaning of all the Acts of Congress relating to Bankruptcy, having been heard and duly considered, the said petition is hereby approved accordingly.

It is thereupon ordered that said matter be referred to NOAH ADAIR, ESQ., one of the Conciliation Commissioners in bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said JAMES MARTIN KIRKPATRICK shall attend before said Conciliation Commissioner on October 25, 1935 and at such times as said Conciliation Commissioner shall designate, at his office in San Bernardino, California, and shall submit to such orders as may be made by said Conciliation Commissioner or by this Court relating to said matter.

WITNESS, the Honorable PAUL J. McCORMICK,
Judge of said Court, and the seal thereof,
at Los Angeles, in said District, on Oc-
(SEAL) tober 18, 1935

R. S. ZIMMERMAN, Clerk,

By L. Wayne Thomas Deputy Clerk”

(Endorsed): Filed R. S. Zimmerman, Clerk, at 10 min.
past 4 o'clock Oct. 18 1935 P.M. By L. Wayne Thomas
Deputy Clerk.

Thereafter, On June 10, 1936, said debtor filed in said matter his amended petition to be adjudged a bankrupt under the provisions of subsection (s) of section 75 of the Bankruptcy Act, in words and figures as follows, to-wit:

“(TITLE COURT AND CAUSE)

AMENDED PETITION

TO: THE HONORABLE JUDGE
OF THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT ABOVE SET
FORTH:—

Your petitioner, the above named debtor, would show unto your Honor that he did, on the 18th day of Oct., 1935, file in this court a petition under Section 75 of the Bankruptcy Act as amended, which petition is still pending; that he has been unable to obtain the acceptance of the majority in number and amount of all creditors whose claims are affected by the composition and extension proposal, which he submitted at the first meeting of creditors to the Conciliation Commissioner appointed by this Court.

That now as permitted by the first paragraph of subsection (s) of Section 75 of the Bankruptcy Act, as amended, he does hereby amend his petition heretofore filed on the 18 day of Oct., 1935, and does substitute for the provisions of said petition as may be in conflict with this amendment, the contents of this amendment.

AND HE PRAYS that he may be adjudged a bankrupt; that proceedings may be had in regard to him and his property in conformity with the law in regard to procedure under Subsection (s) of Section 75 of the Bank-

Subscribed and sworn to before me this.....day of
June, 1936.

(SEAL)

Notary Public in and for said County and State.”

(Endorsed): Filed R. S. Zimmerman, Clerk, at 30 min.
past 9 o'clock June 10 1936 A.M. By F. Betz, Deputy
Clerk

On June 10, 1936, pursuant to said last mentioned peti-
tion, the above entitled court made its order of adjudica-
tion, as follows:

“(TITLE COURT AND CAUSE.)

ADJUDICATION AND ORDER OF REFERENCE.

Under Section 75-s, Bankruptcy Act

At Los Angeles, in said District, on June 10, 1936,
before said Court in Bankruptcy, the petition of JAMES
MARTIN KIRKPATRICK debtor in the above-entitled
matter, that he be adjudged a bankrupt under the terms
and provisions of Section 75-s of the Bankruptcy Act, and
within the true intent and meaning of the Acts of Con-
gress relating to bankruptcy having been heard and duly
considered, the said JAMES MARTIN KIRKPATRICK
is hereby declared and adjudged a bankrupt accordingly.

It is thereupon ordered that said case be referred to
NOAH ADAIR, ESQ., the Conciliation Commissioner
for San Bernardino County, to act as Referee in Bank-
ruptcy of this Court and to take such further proceedings
therein as are required by said Acts; and that the said
JAMES MARTIN KIRKPATRICK shall attend before

said Conciliation Commissioner at his office in San Bernardino, California, on June 17, 1936 at 10:00 o'clock a. m., and shall submit to such orders as may be made by said Conciliation Commissioner, acting as such Referee or by this Court relating to said matter in bankruptcy.

WITNESS, the Honorable Wm. P. James, Judge of said Court, and the seal thereof, at Los Angeles, in said District, on June 10, 1936.

(SEAL)

R. S. ZIMMERMAN, Clerk

By R. B. Clifton Deputy Clerk"

(Endorsed) Filed R. S. ZIMMERMAN, Clerk, at 20 min. past 4 o'clock JUN 10 1936 P.M. By R. B. Clifton Deputy Clerk.

Thereafter, on or about October 19, 1936, said debtor filed a "Petition for Injunction" in said matter, which was and is in words and figures as follows, to-wit:

"(TITLE COURT AND CAUSE)

Comes now above named petitioner and respectfully shows that said above named debtor heretofore to-wit: on the 18th day of October, 1935 filed a petition in the above named court for composition or extension under Section 75 of the Bankruptcy Act of the United States, which petition was duly approved by said court and reference made to Noah Adair as Conciliation Commissioner of San Bernardino County, California, which proceeding has not been dismissed and is still pending and that in said proceedings within the time allowed by law and by the Judge of this court, to-wit: By an order made by the Honorable Leon R. Yankwich April 23, 1936 extending the time to

July 1, 1936 for said debtor to apply for approval of a composition or extension proposal, debtor made a composition and extension proposal to creditors in good faith and proper form but that the principal secured creditor, E. H. Hardt, refused to accept said proposal and said E. H. Hardt on the 17th day of April, 1936 filed with said Conciliation Commissioner a petition for leave to sell the hereinafter described property and for order dismissing debtor's petition.

The said property is described as follows:—

Situated in the County of San Bernardino, State of California, and particularly described as follows, to-wit:—

The South 314 feet of Lots 3 and 4, Tract #2, as per Plat recorded in Book 16 of Maps, page 33, Records of said County.

Such property was subject to a Deed of Trust dated February 16, 1928 executed by James Martin Kirkpatrick and Mary Kirkpatrick, his wife, each of them having identically similar proceedings pending in this court, as they were joint owners of said property and joint obligors and debtors to the said E. H. Hardt who is the owner and holder of the note secured by said trust deed covering said premises, which note was dated February 16, 1928 and made for the sum of \$4,000.00 and interest.

That the Pioneer Title Insurance & Trust Company of San Bernardino, California is named in said Deed as trustee.

That the said petition of said E. H. Hardt for leave to foreclose said trust deed by sale of the premises under said deed of trust and to dismiss said proceedings was duly heard by the Conciliation Commissioner on the 15th

day of May, 1936, and the matter submitted to the Conciliation Commissioner for decision, and at the same time and place your petitioner's proposal for composition or extension was duly submitted to creditors and to said E. H. Hardt for approval and consideration, and at said time said E. H. Hardt indicated that the terms were satisfactory but when it came to formulating acceptance of same said E. H. Hardt insisted upon the dismissal of this proceeding and refused to accept the same.

Your said petitioner thereafter filed amended petition to be adjudged a bankrupt under subsection (s) of said Section 75 of the Bankruptcy Act, also praying that all the property of said debtor wherever located whether pledged, encumbered or unencumbered be appraised and that the unencumbered exemption and unencumbered interest or equity in said exemption as prescribed by law of the State of California as set forth in schedules herein filed in this matter may be set aside and set off to said debtor, and that said debtor be allowed to retain possession under the supervision and control of the court of any part or parcel and all of the remainder of the property of said debtor, including encumbered exemptions, and be allowed to pay for the same under the terms and conditions of subsection (s) Section 75 of the Bankruptcy Act as amended and that the court fix the reasonable rental value of the property of which said debtor retains possession and the terms and payment of same and that said petition was duly approved by the court and said debtor adjudged a bankrupt thereon on the 10th day of June, 1936, under subsection (s) of said Section 75.

That these proceedings are still pending, and your petitioner has complied with all the orders of the court in

respect thereto, and on the 26th day of September, 1936 said Conciliation Commissioner duly denied said petition of E. H. Hardt for leave to sell under said deed of trust and to dismiss debtor's petition and thereafter, to-wit: On the 6th day of October, 1936 said E. H. Hardt filed a petition to review said order of the Conciliation Commissioner in this proceedings and said Petition for Review is now pending upon said petition to review said order of the Conciliation Commissioner refusing to grant said E. H. Hardt permission to foreclose his said Deed of Trust and refusing to dismiss said proceeding, which petition for review is now pending before this court.

That your Petitioner during all of the times herein mentioned has been in the possession of said real property under the exclusive jurisdiction of this court and the instruction and control of the Conciliation Commissioner of this court, but notwithstanding that this court and said Conciliation Commissioner refused to allow said E. H. Hardt to sell said property under said deed of Trust, and the said E. H. Hardt recognized the validity of the order of said Conciliation Commissioner herein by taking a review of the same, and said E. H. Hardt with the advice of his attorney John Surr and in contempt of this court and *it's* order and jurisdiction and without obtaining any consent from this court, said E. H. Hardt caused said property to be sold by the Pioneer Title Insurance & Trust Company, trustee under said deed of trust foreclosing the said Deed of Trust held by said E. H. Hardt on the 13th day of October, 1936 at which sale said E. H. Hardt bought the said property at the sum of \$5,250.00 and obtained a deed from said trustee to said property under said deed of trust at said sale and is threatening to take

possession under said deed of trust or seek to recover possession of said property in the state court and to cloud the title to the said property and interfere with the possession of debtor and the control of this court over said property, of which property said debtor by order of the Conciliation Commissioner herein acting as Referee has been permitted to retain possession for three years, and under which said petitioner is in possession.

That the said sale is a void and contemptuous sale. That during all of the period while this proceeding has been pending said E. H. Hardt and his trustee, Pioneer Title Insurance & Trust Company, acting under his direction has recognized that they had no right or jurisdiction to hold the sale under the deed of trust until they obtained permission from this court or until this proceedings was dismissed and for a great many months continued to send notice to debtor from time to time that the trustee's sale of said property was postponed from one date to another date so specifying, and this petitioner receiving said notices continuously relied upon that at the time to which each month's sale was continued did not mean that any sale would be held at said time and that this petitioner had no notice or idea that a sale actually would be held on October 13th, 1936 and had no notice of said sale until some time thereafter. The said sale was an unfair illegal and void sale.

WHEREFORE your petitioner prays that said sale may be declared a void sale and a deed issued by said Pioneer Title Insurance and Trust Company to said E. H. Hardt be cancelled and that said E. H. Hardt and his agents and attorneys be prohibited and enjoined from recording said deed and from endeavoring to obtain possession of said property under said deed and from doing

“(TITLE COURT AND CAUSE)

Comes now E. H. Hardt (hereinafter called “Hardt”) and by answering the “Petition For Injunction” heretofore filed by the above named debtor in the above entitled matter, admits, denies and alleges as follows:

Denies that any composition or extension proposal made by said debtor was made in good faith; admits that Hardt insisted, as a condition to entering into any extension or composition agreement, that the above entitled proceeding should be dismissed concurrently with such agreement becoming effective; denies that this Court or any Conciliation Commissioner thereof ever refused to allow Hardt to sell any property, except that Noah Adair, as Conciliation Commissioner, made an order denying Hardt’s petition in said proceeding to dismiss the same and for leave to sell the real property therein described, which order of said Conciliation Commissioner is being reviewed as set forth in said “Petition For Injunction”, and which petition to dismiss and for leave to sell was filed and heard prior to said debtor petitioning to be adjudged bankrupt under the provisions of section 75, subdivision (“s”) of the Bankruptcy Act.

Denies that Hardt ever in any way recognized any validity in or of said order of said Conciliation Commissioner, or ever did any act in contempt of this Court or any order thereof.

Admits that Hardt is threatening to and will petition the above entitled Court for an order decreeing to be valid the sale mentioned in said “Petition For Injunction”, and for an order that the above named debtor yield possession of said real property to Hardt, and decreeing Hardt to be

the sole owner of said real property, but denies that Hardt is threatening any other act or thing whatever.

Denies that said debtor, by any order of any Conciliation Commissioner, or otherwise, has been or will be permitted to retain possession of said real property for any period subsequent to October 13, 1936; denies that the sale mentioned in said "Petition For Injunction" was or is at all void or contemptuous, and denies that at any time subsequent to the filing of said debtor's petition to be adjudicated a bankrupt under the provisions of subdivision "s" of section 75 of the Bankruptcy Act, Hardt and Pioneer Title Insurance and Trust Company, or either of them, recognized, or specified, that there was any limitation upon their right to sell said real property under the deed of trust mentioned in said "Petition For Injunction"; and alleges that at all times subsequent to the filing of said debtor's petition to be adjudicated a bankrupt, and at all times after June 10, 1936, Hardt and Pioneer Title Insurance and Trust Company had the right to conduct such a sale, and that no order was ever made by the above entitled Court prior to said sale on October 13, 1936, restraining Hardt or Pioneer Title Insurance and Trust Company from conducting such sale or any sale.

Alleges that notice of the original date set for said sale was given by posting such notice upon said real property, and by publishing the same in a newspaper of general circulation in the township where said real property is situated, all in conformity to law and the terms of said deed of trust; and that said debtor was actually notified in writing of the original date of said sale and of each postponed date of said sale, prior, respectively, to said original date and said postponed dates; and each of said postpone-

ments were duly made by public announcement at the time and place theretofore set for sale, all in accordance with the provisions of said deed of trust.

Denies that said sale was in any way unfair, illegal or void.

FURTHER ANSWERING SAID PETITION
HARDT ALLEGES THAT:

I.

The \$4,000 note mentioned in said petition was dated February 16, 1928, and provided that the principal sum thereof, to-wit, \$4,000, should be paid in gold coin on or before five years after its date, and that said principal sum should bear interest at the rate of six per cent per annum, payable semi-annually after its date. At all times since September 7, 1933, Hardt has been and now is the owner and holder of said note.

II.

No part of the principal sum of said note has ever been paid, except by, and from the proceeds of, the sale under the deed of trust mentioned in said "Petition For Injunction"; and none of the interest for the period since August 15, 1932, has ever been paid, except from the proceeds of said sale, and at the time of said sale there was owing and unpaid and secured by said deed of trust a sum exceeding \$5,500.

III.

In and by said deed of trust James Martin Kirkpatrick and Mary Kirkpatrick conveyed the said real property and five shares of the capital stock of Monte Vista Water Company, a corporation, (which shares are hereinafter

called "water stock"), to Pioneer Title Insurance and Trust Company, a corporation, (hereinafter called "Trustee"), in trust to secure the payment of said note and to secure certain other obligations in said deed of trust specified; and in said deed of trust it was provided that said Trustee should have the power to sell said real property for the purpose of satisfying said note in the event that a default should be made in the payment of said note.

IV.

On or about July 9, 1935, Hardt waived, in writing, all provisions of said note and of said deed of trust requiring gold coin to be the medium of payment of said note, or requiring bids at any sale under said deed of trust to be in gold coin, and caused to be filed in the office of the County Recorder of San Bernardino County a notice of default under said deed of trust, which notice of default was recorded in said office on or about said date.

V.

The Trustee, after due notice of the time and place of sale given in accordance and in full compliance with the terms and provisions of said Deed of Trust, and in full compliance with the provisions of Section 692 of the California Code of Civil Procedure and 2924 and 2924-b of the California Civil Code, and all other provisions of law, did, in accordance with said sections and said Deed of Trust (except that pursuant to the waiver mentioned in paragraph IV hereof, said Trustee did not at said sale require bids or payments to be made in gold coin) duly sell at public auction, to Hardt (who was the highest and best bidder therefor) on the 13th day of October, 1936, at the hour of 10:00 o'clock A. M., for the sum of \$5,250,

the real property and water stock mentioned in paragraph III hereof; and said Trustee and Hardt respectively have, and at the time of said sale had duly performed all of the requirements and conditions contained in said Deed of Trust and all requirements and conditions of law on their part or on the part of either of them to be performed as a condition or as conditions precedent to said sale.

VI.

At the time of said sale Hardt became and ever since has been and now is the owner of said real property and water stock; and at said time the market value of said real property and water stock did not exceed the sum of \$4,750, and the amount bid and paid for said real property and water stock (to-wit, \$5,250) was and ever since has been far in excess of the value of said real property and water stock, and said sale was in all respects fair and regular.

VII.

Neither the above named debtor nor his estate has any right, title, interest or equity in or to said real property and water stock or any part thereof, but said debtor and the estate of said debtor wrongfully assert some right, title and interest in and to said real property and water stock, and wrongfully withhold possession of said real property from Hardt.

WHEREFORE, Hardt prays that said debtor take nothing by said "Petition For Injunction", and that it be ordered and decreed by this Court that Hardt is the owner of said real property and water stock, and that neither said debtor nor the estate of said debtor has any right, title or interest therein or thereto, and that said debtor and said estate be restrained by this Court from asserting any

right, title or interest in or to said real property or water stock, and that said debtor be ordered and directed to forthwith surrender the possession of said real property to Hardt.

E. H. HARDT

SURR & HELLYER

Attorneys for E. H. Hardt.

STATE OF CALIFORNIA,)
COUNTY OF SAN BERNARDINO.) ss.

E. H. HARDT, being first duly sworn, says:

That he is the person named in and who makes the foregoing Answer to "Petition For Injunction"; that he has read said Answer and knows the contents thereof, and that the same is true of his own knowledge except as to matters therein stated upon information or belief, and as to such matters he believes it to be true.

E. H. HARDT

Subscribed and sworn to before me
this 29 day of October, 1936.

G. B. HARDING

Notary Public in and for said County and State.

(NOTARIAL SEAL)

After the filing of said "Petition For Injunction" and said Answer thereto, said Petition and Answer were heard by the above entitled Court and were submitted to said Court for decision; and thereafter said Court rendered its opinion and made its order dated November 24th, 1936, and entered on said date, from which order an appeal has

been taken by E. H. Hardt to the United States Circuit Court of Appeals for the Ninth Circuit.

That at the time of said hearing the matter was, by agreement of the counsel for E. H. Hardt and for said debtor in said proceeding, submitted to the Court upon said verified "Petition For Injunction" and upon said verified Answer thereto, and upon the records of the Court and the briefs of counsel; but no oral or other evidence was adduced, or given, or submitted to the Court at said hearing or in support of said petition for injunction or said answer.

The pleadings, papers and orders, copies of which are hereinbefore set forth, are the only pleadings, papers, orders or records in the above entitled matter which were or are relevant or material to the decision of or the granting or denying of the above mentioned Petition For Injunction, or the Answer thereto, or which were or are relevant or material to the said appeal or to the decision of said appeal.

The foregoing statement is and may be treated as a statement of the above entitled case upon said appeal, showing how the questions involved in said appeal arose and were tried in the United States District Court for the Southern District of California, Central Division, setting forth so much only of the facts alleged and proved herein as is essential to a decision of said questions by the United States Circuit Court of Appeals for the Ninth Circuit, and said statement is made pursuant to Rule 77 of the Rules of Practice for the Courts of Equity of the United States promulgated by the Supreme Court of the United States. As such, the within statement, when filed in the office of said United States District Court, may be

treated as superseding, for the purposes of said appeal, all parts of the record in the within matter, other than the above mentioned opinion and order of said United States District Court made and entered on November 24th, 1936, and, together with said order, may be copied and certified to said Circuit Court of Appeals as the record on appeal herein.

DATED: January 22nd, 1937.

N C Peters

Attorney for Debtor.

Surr & Hellyer.

Attorneys for E. H. Hardt.

The preparation and filing of the above as an agreed statement of the above entitled case upon the above mentioned appeal, superseding, for the purposes of said appeal, all parts of the record of the within case other than the above mentioned opinion and order from which said appeal is taken, is hereby approved, and said agreed statement of the case and said order may and they shall be copied and certified to the United States Circuit Court of Appeals for the Ninth Circuit as the record on appeal herein.

DATED this 25th day of January, 1937.

Leon R. Yankwich

United States District Judge.

Approved as to form as provided in Rule 44.

N C Peters

Attorney for Debtor

[Endorsed]: Filed Jan 25 1937 at 12 m. R. S. Zimmerman, Clerk By F. Betz Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED
STATES SOUTHERN DISTRICT OF
CALIFORNIA CENTRAL DIVISION

---o---

In re JAMES MARTIN KIRKPAT-) Nos. 26720-Y
RICK and MARY KIRKPATRICK,) 26721-Y
)
Bankrupts) OPINION

APPEARANCES:

N. C. PETERS, Esq.
Attorney for Bankrupts.

SURR & HELLYER
Attorneys for E. H. Hardt.

YANKWICH, District Judge.

On October 18, 1935, the debtors, who are husband and wife, filed identical petitions for composition and extension under Section 75 of the Bankruptcy Act. On April 17, 1936, while the petition was still pending, the respondent, E. H. Hardt, filed with the Conciliation Commissioner a petition for dismissal of the petition and for leave to sell farming real property in San Bernardino County, California, on which he held a deed of trust, upon which default had been made, both as to principal and interest, prior to the institution of the proceedings. The petition was denied on September 26, 1936, and a petition for the review of the order is still pending. On June 10, 1936, the debtors were adjudged bankrupts under Section 75-s. On October 13, 1936, the respondent caused the property to be sold by the Pioneer Title Insurance and Trust Com-

pany, trustee under the deed of trust, under the power of sale contained in the instrument. The method of the sale conformed to the provisions of Section 692 of the California Code of Civil Procedure and Sections 2924 and 2924b of the California Civil Code. The respondent bought the property for the sum of \$5250.00.

By the present proceedings, the debtors, who, during all this time, have been and still are, in possession of the property, seek to have the sale declared invalid and to enjoin the respondent from obtaining possession.

The question involved is whether, while proceedings under Section 75 and 75-s are pending, the creditor may foreclose under a deed of trust without permission of the court.

At the time of the sale, the proceeding for conciliation had terminated. Concede that Subdivision (n) applies to such proceedings only. Nevertheless, once a proceeding in bankruptcy is begun, it is solely within the power of the bankruptcy court to ascertain the amount and validity of pre-existing liens and to decree the manner of their liquidation. (See, *Isaacs v. Hobbs Tie & Timber Co.* (1931) 282 U. S. 734, 738; *Ex parte Baldwin*, (1934) 291 U. S. 610, 615)

It is true that courts have recognized the right of the holder of a lien, who had begun proceedings for foreclosure prior to the institution of bankruptcy proceedings, and, especially before adjudication, to complete them. (See *Hiscock v. Varick*, (1907) 206 U. S. 28; *Robinson v. Kay* (C.C.A. 9, 1925) 7 Fed. (2d) 576; *Heffron v. Western Loan & Building Company*, (C.C.A. 9, 1936) 84 Fed (2) 301) However in this case all proceedings for the foreclosure of the deed of trust under the power of sale

were initiated while the property was in the custody of this court under proceedings first instituted under Section 75 and then continued under Section 75-s of the Bankruptcy Act.

Permission to sell was not secured. On the contrary, it was denied.

Under the circumstances,—and notwithstanding certain general language contained in some of the decisions just cited, notably *Heffron v. Western Loan & Building Company*, *supra*,—we are of the view that the owner of a deed of trust cannot deprive the court of the jurisdiction it has acquired over the property by instituting and completing, while the property is in custody of the law, proceedings to foreclose. To our knowledge, the most recent case in which the question has been ruled upon directly is *Comer v. John Hancock Mutual Life Insurance Company* (1935) 80 Fed (2) 413. There, the power of the bankruptcy court to allow a sale under a deed of trust was challenged. Sustaining the power, the Court said:

“Of course, a holder of a deed of trust containing a power of sale would have just as much right to ignore the bankruptcy court and foreclose, as would a mortgagee who resorted to a strange court for strict foreclosure, that is to say, no right at all. For we think it clear that the principle announced by the Supreme Court plainly carries an inhibition, both against foreclosure by a sale under a power in a deed of trust, and a strict foreclosure in a court of equity, absent a lawful order by the bankruptcy court so permitting.” (*Comer v. John Hancock Mut. Life Ins. Co. supra* at 415) (Italics added.)

And again,

“And till that court had in accord with law abdicated its jurisdiction, no person and no other court could acquire power or jurisdiction to deal with it, or change its status and of course could pass no title to it to another by a purported sale or otherwise. So much is made clear by the case of *Isaacs v. Hobbs Tie & Timber Co.*, *supra*. As pointed out already, the bankruptcy court can for sufficient cause relinquish its jurisdiction lawfully and permit another court, or other persons under a deed of trust or a mortgage, to assume jurisdiction over encumbered lands, or property of a bankrupt estate. But till it has done so pursuant to law, other persons and other courts must keep hands off so far as concerns power to deal with and jurisdiction over the property of a bankrupt in his possession at adjudication, whether encumbered or not. *Hobbs Tie & Timber Co. v. Isaacs* (C.C.A.) 61 F (2) 1006”. (*Comer v. John Hancock Mut. Life Ins. Co.*, *supra* at 417) (Italics added.)

(And see: *In re Jersey Island Packing Co.* (C.C.A. 9, 1905) 138 Fed 625 at 627; *In re Eppstein* (C.C.A. 8, 1907) 156 Fed. 42; *Cohen v. Nixon & Wright* (D.C. Ga. 1916) 236 Fed 406; *Allebach v. Thomas* (C.C.A. 4, 1927) 16 Fed (2) 853); Apposite is the language of Gilbert, C.J. in *Re Jersey Island Packing Co.*, *supra*, at page 627:

“It is true that the bankruptcy act provides that liens such as the lienholders had under the trust deeds in this case shall not be affected by bankruptcy, but that is far

from saying that such lienholders may, after the commencement of proceedings in bankruptcy against the debtor, proceed to enforce their liens or contracts in the manner prescribed in the instruments which create them; and this is true whether such lien is an ordinary mortgage, or a deed of trust with provision for a strict foreclosure by a notice and sale. The provision of the bankruptcy act that such a lien shall not be affected by the bankruptcy proceedings has reference to his remedy to enforce his right. The remedy may be altered without impairing the obligation of his contract, so long as an equally efficient and adequate remedy is substituted. Every one who takes a mortgage, or deed of trust intended as a mortgage, takes it subject to the contingency that proceedings in bankruptcy against his mortgagor may deprive him of the specific remedy which is provided for in his contract." (Italics added.)

The distinction in principle between cases wherein the machinery for foreclosure had been started prior to adjudication and cases like the instant one is clear.

In the former, either by law or by contract, the creditors, by instituting proceedings had placed the property in the custody of another court or had acquired certain vested rights with the fruition of which the bankruptcy courts could not interfere. To allow such rights to ripen into title, before adjudication, is consistent with the spirit of the bankruptcy law and of due process.

It means also carrying into effect the principle that once a court has acquired jurisdiction, it should not be ousted from it, and that a right in the process of judicial or quasi-judicial liquidation before bankruptcy should not be interfered with. (See, *In re Smith*, (D. C. Tex. 1924) 3 Fed (2) 40; *Straton v. New* (1931) 283 U. S. 318)

But to allow the holder of a deed of trust to ignore entirely the bankruptcy court and to institute, without its consent, proceedings for the sale of the property while it and the equitable interest of the maker in it are in the custody of the court, and, after adjudication, and while the maker is in possession, would amount to a surrender by the bankruptcy court, without its consent, of that exclusive jurisdiction it acquires over the bankrupt's property, by the bankruptcy proceedings and especially by the adjudication,—a jurisdiction which extends to the valid pre-existing liens. (*In Re Island Packing Co.*, *supra*) Upon a proper showing, the bankruptcy court may surrender this jurisdiction. The owner of a deed of trust may thus have his remedy by asking for it. But the court may also decline to grant it. Its judgment will not be disturbed, except for abuse of discretion. For the right to apply for permission to foreclose does not imply the right to have it granted. As said in *Hobbs Tie & Timber Co. v. Isaacs*, (C.C.A. 5, 1932) 61 F (2) 1006 at 1007:

“It had and has the right, of course, to invoke the aid of the court of bankruptcy to realize upon its debt. It had and has the right to apply to that court for the sur-

render of the mortgage property as burdensome to the bankrupt's estate. It had and has the right to apply to that court for its consent to proceed with the foreclosure suit. It could not, as it attempted to do here, demand as of right that that consent be granted." (Italics added)

If the holder of a lien cannot complain, when he asks of the bankruptcy court permission to foreclose and is refused,—to allow him to do so, without asking, and to approve his act, after it is done, is to sanction the flaunting of the power of the bankruptcy court,—a flaunting which would destroy the effectiveness of the administration of the Bankruptcy Act. In view of the salutary purpose of the Act, we should not give our approval to anything which savors of such flaunting.

The petition is granted.

The sale is declared invalid and the respondent is enjoined from interfering with the possession of the debtors.

The respondent may apply again for leave to sell, if so advised.

Exception to the respondent.

Dated this 24th day of November, 1936.

Leon R. Yankwich
United States District Judge

[Endorsed]: Filed Nov. 24 - 1936 at 11:58 a.m. R. S. Zimmerman, Clerk By Louis J. Somers, Deputy Clerk.

IN THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

In the Matter of)
) No. 8425
JAMES MARTIN KIRKPATRICK,) PETITION
) FOR
Debtor.) APPEAL

TO THE HONORABLE JUDGES OF THE UNITED
STATES CIRCUIT COURT OF APPEALS, FOR
THE NINTH CIRCUIT:

E. H. HARDT (hereinafter called "Hardt") conceiv-
ing himself aggrieved by that certain order made and
entered on the 24th day of November, 1936, in and by
the District Court of the United States for the Southern
District of California, Central Division, pursuant to the
"Petition For Injunction" of the above named debtor, on
file in said District Court in the above entitled matter,
does hereby appeal from said order and from the whole
thereof to the Circuit Court of Appeals for the Ninth
Circuit for the reasons specified in the Assignment of
Errors, which is filed herewith, and Hardt prays that this
appeal be allowed, that a citation issue, as provided by
law, directed to the above named debtor; that a transcript
of the record, proceedings and papers upon which said
order was made be duly authenticated and sent to said
Circuit Court of Appeals for the Ninth Circuit; and that
the proper order as to the security to be required of peti-
tioner, to perfect his appeal, be made.

E. H. HARDT

Appellant.

SURR & HELLYER,

By JOHN B. SURR

Attorneys for Appellant.

STATE OF CALIFORNIA,)
) ss.
 COUNTY OF SAN BERNARDINO.)

E. H. HARDT, being first duly sworn, says:

That he is the petitioner named in and who makes the foregoing Petition for Appeal. That he has read said Petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters he believes it to be true.

E. H. HARDT

Subscribed and sworn to before me this 23 day of December, 1936.

[Seal]

P. McLARNAN

Notary Public in and for said County and State.

[Endorsed]: Received copy of the within Petition thisday of January, 1937. N. C. Peters, Attorney for Debtor. Filed R. S. Zimmerman, Clerk, at 37 min. past 12 o'clock p. m. Jan. 16, 1937 By R. B. Clifton, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

ASSIGNMENT OF ERRORS

No. 8425.

Comes now E. H. HARDT, by his attorneys, and in connection with his appeal from an order of the United States District Court for the Southern District of California, Central Division, made and entered on the 24th day of November, 1936, pursuant to the "Petition for Injunction" of the above named debtor filed in said District Court in the above entitled matter, said E. H. Hardt hereby makes and files the following assignment of errors, to-wit:

1. Said order is contrary to law.

2. Said District Court erred in holding that its prior consent was necessary to the validity of a sale of the above named debtor's property, made pending such debtor's proceeding under section 75-s of the Bankruptcy Act, such sale being made under the provisions of a deed of trust executed by such debtor many years prior to the existence of any bankruptcy proceeding affecting said debtor.

3. Said District Court erred in declaring invalid a sale made, under a deed of trust, of land owned by the debtor subject to said deed of trust, where the sale price of the land under such sale exceeded its value, the sale was in all respects regular, no injunction ever issued against such sale, and the deed of trust had been executed years before any bankruptcy proceeding affecting the debtor had been instituted, although the debtor had been adjudicated a bankrupt prior to sale, and at the

time of sale proceedings were pending under Section 75, sub-division "s", of the Bankruptcy Act.

4. Said District Court erred in restraining E. H. Hardt from interfering with the possession by the debtor of the land sold to E. H. Hardt at such sale, under the terms of such deed of trust.

5. Said District Court erred in holding that the proceedings for the sale under said deed of trust were initiated during any bankruptcy proceedings affecting said debtor or otherwise than prior to the filing of the above entitled proceeding and prior to October 18, 1935.

6. Said District Court erred in making said order, for the reason that said "Petition For Injunction" did not state facts sufficient to warrant the making of said order or any part thereof.

WHEREFORE, said E. H. Hardt prays that said order be reversed, and that the case be remanded, with instructions to the trial court as to further proceedings therein, and for such other and further relief as may be just in the premises.

DATED: December 22, 1936.

E. H. HARDT

Appellant.

SURR & HELLYER

BY JOHN B. SURR

Attorneys for Appellant.

[Endorsed: Received copy of the within Assignment of Errors this day of January, 1937. N. C. Peters Attorney for Debtor. Filed R. S. Zimmerman, Clerk, at 37 min. past 12 o'clock p. m. Jan 16 1937 R. B. Clifton, Deputy Clerk.

At a Stated Term, to wit: The October Term A. D. 1936, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday the sixth day of January in the year of our Lord one thousand nine hundred and thirty-seven.

PRESENT:

Honorable CURTIS D. WILBUR, Senior Circuit Judge, Presiding,

Honorable FRANCIS A. GARRECHT, Circuit Judge,

Honorable WILLIAM DENMAN, Circuit Judge.

E. H. HARDT,

Appellant,

vs.

JAMES MARTIN KIRKPATRICK,

Appellee.

No. 8425

ORDER ALLOWING APPEAL.

Upon consideration of the petition of E. H. Hardt, for allowance of appeal under section 24b of the Bankruptcy Act, filed December 24, 1936, and of the assignments of

error thereon, filed therewith, and by direction of the court,

IT IS ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order of the District Court of the United States for the Southern District of California, Central Division, made and entered on the 24th day of November, 1936, be, and the same hereby is allowed, conditioned upon the giving of a cost bond in the sum of Two Hundred and Fifty Dollars (\$250.00) with good and sufficient security, within ten days from date.

IT IS FURTHER ORDERED that if an appeal has been heretofore allowed in this cause by said District Court, and a cost bond given on such appeal, then no additional cost bond need be given on this appeal.

Service of a copy of the within order is hereby admitted this 14th day of January, 1937.

N C Peters

Attorney for Appellee.

[Endorsed]: Filed R. S. Zimmerman Clerk at 35 min. past 12 o'clock p. m. Jan. 16, 1937 By R. B. Clifton, Deputy Clerk

[TITLE OF COURT AND CAUSE.]

No. 8425

BOND FOR COSTS ON APPEAL

KNOW ALL MEN BY THESE PRESENTS:

That we, E. H. HARDT, as principal, and BESSIE HARDT and FRANK F. SARGENT, as sureties, are held and firmly bound unto the above named debtor in the sum of FIVE HUNDRED DOLLARS, for the payment of which well and truly to be made we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, by these presents.

DATED, this 23rd day of December, 1936.

WHEREAS, the above named E. H. HARDT has prosecuted, or is about to prosecute, an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the order in the above entitled proceeding entered in the office of the Clerk of the United States District Court, for the Southern District of California, Central Division, on the 24th day of November, 1936;

NOW THEREFORE, the condition of this obligation is such that if the above named E. H. Hardt shall prosecute his appeal to effect and answer all damages and costs if he fails to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

E. H. HARDT

Principal

BESSIE HARDT

FRANK F. SARGENT

Sureties.

STATE OF CALIFORNIA,)
 (ss.
 COUNTY OF SAN BERNARDINO.)

E. H. HARDT, BESSIE HARDT and FRANK F. SARGENT, being first duly sworn, each for himself says:

That he is a resident and freeholder within the State of California, and within the Southern District of California, Central Division, and is worth the amount specified in the above and foregoing bond over and above all his just debts and liabilities, exclusive of property exempt from execution.

E. H. HARDT
 BESSIE HARDT
 FRANK F. SARGENT

Subscribed and sworn to before me this 23 day of December, 1936.

(NOTARIAL SEAL) P. McLARNAN
 Notary Public in and for said County and State.

Examined and recommended for approval as provided in Rule 28.

SURR & HELLYER
 Attorneys for Appellant.

I hereby approve the foregoing bond this 16th day of January, 1937.

CURTIS D. WILBUR

Judge United States Circuit Court of Appeals,
Ninth Circuit.

STATE OF CALIFORNIA,)
(ss.
COUNTY OF SAN BERNARDINO.)

On this 23 day of December, 1936, before me, P. McLARNAN, a Notary Public in and for said County, personally appeared E. H. HARDT, BESSIE HARDT and FRANK F. SARGENT, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

WITNESS my hand and official seal.

(NOTARIAL SEAL)

P. McLARNAN

Notary Public in and for said County and State.

[Endorsed]: Filed R. S. Zimmerman Clerk at 35 min.
past 10 o'clock a. m. Jan 25 1937 By F. Betz, Deputy
Clerk

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION.

In the Matter of	)	No. 26720-Y
)	
JAMES MARTIN KIRKPATRICK,	)	(C. C. A.,
	)	9th Cir.,
Debtor.	)	No. 8425)
-----	)	PRAECIPE
	)	INDI-
E. H. HARDT,	)	CATING
	)	PORTIONS
	)	OF REC-
Appellant,	)	ORD TO
	)	BE INCOR-
vs.	)	PORATED
	)	IN TRAN-
JAMES MARTIN KIRKPATRICK,	)	SCRIPT
	)	ON
Appellee.	)	APPEAL

To the Clerk of the United States District Court, Southern District of California, Central Division:

Please prepare and certify a transcript on appeal in the above entitled matter and include therein the following papers and documents:

1. Circuit Court of Appeals citation.
2. Circuit Court of Appeals petition for appeal.
3. Circuit Court of Appeals assignment of errors.
4. Circuit Court of Appeals order allowing appeal.

5. Bond for costs on appeal, (entitled in the United States Circuit Court of Appeals, Ninth Circuit).

6. Agreed statement of the case.

7. Order of the above entitled court, in the above entitled matter, which order is entitled "Opinion", is dated November 24, 1936 and is signed by Leon R. Yankwich, United States District Judge

8. Clerk's certificate of transcript.

9. This praecipe.

DATED: This 23rd day of January, 1937.

SURR & HELLYER,

By John B. Surr

Attorneys for E. H. Hardt, Appellant.

Service by copy of the within Praecipe is admitted this 23d day of January, 1937, and it is hereby stipulated that no further papers than those designated above need be incorporated in the transcript on appeal in the above entitled matter.

N C Peters

Attorney for Debtor.

[Endorsed]: Filed R. S. Zimmerman, Clerk at 37 min. past 10 o'clock a. m. Jan. 25, 1937 By F. Betz Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 46 pages, numbered from 1 to 46 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; agreed statement of the case; opinion; petition for appeal; assignment of errors; order allowing appeal; bond for costs on appeal, and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is \$ and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..... and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this..... day of February, in the year of Our Lord One Thousand Nine Hundred and Thirty-six and of our Independence the One Hundred and Sixty-first.

R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.